

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLANT**

74-1032

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
BERNARD MATTHEWS

Petitioner-- Appellant

-against-

No. 74-1032

JULIUS MOEYKENS

Respondant - Appellee

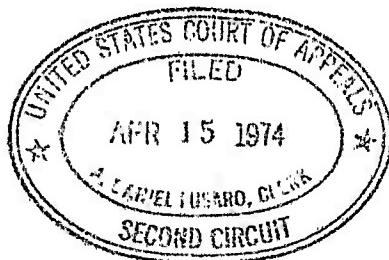
-----X

BRIEF FOR PETITIONER-APPELLANT

Pursuant to

ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT



ERIC KRONFELD, ESQ.
Attorney for Petitioner-Appellant
1501 Broadway
New York, New York 10036
212-563-6440

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
BERNARD MATTHEWS :
Petitioner - Appellant :
-against- : No. 74-1032
JULIUS MOEYKENS :
Respondent - Appellee :
-----x

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of JEFFREY L. LAYTIN, sworn to the 15th day of April, 1974, a memorandum of law, and the prior proceedings herein, the undersigned will move this Court at the United States Court House, Foley Square, New York, New York, in Room 1705, on May 20, 1974, at the opening of Court on that day or as soon thereafter as counsel can be heard, for an order permitting the withdrawal of ERIC KRONFELD, as assigned counsel for appellant.

Yours, etc.


ERIC KRONFELD, ESQ.
Attorney for Petitioner-Appellant
1501 Broadway
New York, New York 10036
212-563-6440

Dated: April 15, 1974
New York, New York

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BERNARD MATTHEWS

Petitioner - Appellant

-against-

No. 74-1032

JULIUS MOEYKENS

AFFIDAVIT

Respondent - Appellee

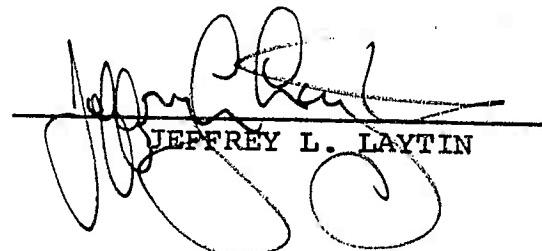
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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JEFFREY L. LAYTIN, being duly sworn, deposes and says that I am an attorney associated with Eric Kronfeld, Esq., who is counsel for the Petitioner-Appellant on the above captioned appeal. This affidavit is made in support of a motion to be relieved as counsel on the ground that the record does not present any non-frivolous issue for appeal. See Anders v. California, 386 U.S. 738 (1967) and accompanying memorandum of law filed with this affidavit.

I have examined the record, including the trial transcript, the petition and other papers in this matter and finding no issues which are not frivolous, I respectfully request that the Court grant the within motion to have Eric Kronfeld relieved as counsel.

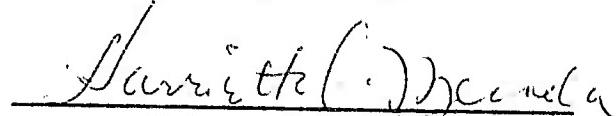
I have written to the Petitioner-Appellant to inform him of the nature of this motion and furnish him a copy of this Affidavit and the memorandum of law. A copy of that letter is annexed.

For the foregoing reasons, it is respectfully urged that the Court grant the relief requested herein.



JEFFREY L. LAYTIN

Sworn to before me this
15th day of April, 1974



Harriette C. Merolia
Notary Public
HARRIETTE C. MEROLIA
Notary Public, State of New York
No. 31-7903385
Qualified in New York County
Commission Expires March 30, 19⁷⁶

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BERNARD MATTHEWS

Petitioner - Appellant

: No. 74-1032

-against-

JULUIS MOEYKENS

Respondant - Appellee

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BRIEF FOR PETITIONER-APPELLANT

Pursuant to

ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
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ERIC KRONFELD, ESQ.
Attorney for Petitioner-Appellant
1501 Broadway
New York, New York 10036
212-563-6440

JEFFREY L. LAYTIN
Of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
BERNARD MATTHEWS

Petitioner - Appellant

-against-

JULIUS MOEYKENS

Respondent - Appellee

No. 74-1032

MEMORANDUM OF LAW

FOR PETITIONER - APPELLANT

Pursuant to

ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

QUESTION PRESENTED

Whether counsel for Petitioner-Appellant should
be relieved on the grounds that no non-frivolous questions
are presented on appeal.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order, dated November 9, 1973, in the U.S. District Court for the District of Vermont, (Holden, C. J.) (Civil Action File No. 73-301) denying the Petitioner, Bernard Matthews, a writ of habeas corpus.

Statement of Fact and Previous Proceedings

In May, 1971 Petitioner was charged with aiding and abetting assault with intent to rob, a felony in the State of Vermont. Petitioner was subsequently permitted to plead guilty to a lesser crime of aiding and abetting the operation of a motor vehicle without the owner's consent, a misdemeanor. Petitioner was sentenced to a term of not more than one year in the Windsor State Prison, Vermont on the misdemeanor charge. At the same time, Donald Goodrich, the principal of the crime, was also permitted to enter a plea of guilty to the misdeameanor of operating a motor vehicle without the owner's consent.

Upon a subsequent motion, Petitioner was allowed to withdraw his plea of guilty. The plea was stricken and upon motion of the State of Vermont, over Petitioner's objection, the original felony charge of aiding and abetting assault

with intent to rob was re-instated. Petitioner was convicted on the re-instated felony charge after a jury trial on April 24-25, 1972. The conviction was later confirmed by the Vermont Supreme Court on October 2, 1973.

While awaiting sentencing, Petitioner was charged with a further crime of arson in the first degree on June 1, 1972. The crime was committed while Petitioner was at Rutland Community Correctional Center in Rutland, Vermont. Petitioner was subsequently convicted of this charge on March 8, 1973 and sentenced to serve not less than three nor more than ten years in the state prison.

On June 2, 1973 Petitioner was sentenced on the April 1972 felony conviction to a term of not less than three nor more than ten years in state prison. However, as to this sentence, Petitioner was placed on probation with special terms, to wit, that as soon as he was legally able he would leave the State of Vermont and not return without permission of the Director of The Division of Parole, Department of Corrections, State of Vermont.

On November 18, 1973 Petitioner filed a notice of appeal from the order of Chief Judge Holden (dated November 9, 1973) denying a writ of habeas corpus and requested a Certificate of Probable Cause, which was granted by Chief Judge Holden on November 29, 1973.

Petitioner essentially contended in his Request For Certificate of Probable Cause that: (i) his conviction for aiding and abetting assault with intent to rob (under 13 V.S.A. §605) violated due process of law, because the principal had not been convicted for that crime but had been convicted of a lesser crime which Petitioner claimed was the equivalent of an acquittal, citing U.S. v. Pyle, 279 F. 290 (D.C.S.D.Cal.1921) for the proposition that an aider and abettor cannot be convicted when the principal is acquitted; and (ii) Petitioner had not had a fair hearing on the habeas corpus proceeding because he had been denied assistance of legal counsel.

Statement of Legal Issues

I

PETITIONER WAS NOT DENIED DUE PROCESS BY CONVICTION
FOR AIDING AND ABETTING A FELONY WHERE THE PRINCIPAL WAS
CONVICTED OF A LESSER MISDEMEANOR CHARGE.

Petitioner's basic contention is that his conviction, pursuant to 13' V.S.A. §605, of aiding and abetting assault with intent to rob violated due process because the principal of the crime was convicted of a lesser offense.

Petitioner contends that "if the principal is acquitted there can be no prosecution of the accessory".

As support for this proposition, Petitioner cites United States v. Pyle et al., 279 F.290 (D.C.S.D.Cal.1921), a case which was decided on an interpretation of Rev. St. §5209, involving the embezzlement of funds from a national bank. Pyle was decided on narrow technical grounds and is wholly distinguishable from the instant case. See, 18 U.S.C.A. §1005, Giragosian v. United States, 349 F.2d 167 (1st Cir. 1965).

As Chief Judge Holden states in his order of November 9, 1973, statutes in most jurisdictions have abrogated the distinction between principals and accessories. See, La Fave and Scott, Criminal Law 500-501 (1972). See, e.g. 18 U.S.C.A. § 2(a,b). The statute applicable to the instant case is 13 V.S.A. § 3 which provides:

"A person who aids in the commission of an offense punishable by death or imprisonment in the state prison shall be punished as a principal."

It follows, a fortiori, that since assault with intent to rob is punishable by imprisonment in the state prison, 13 V.S.A. §§ 605,606, Petitioner's conviction as an accessory may stand even if the principal was acquitted.

The prevailing case in the Second Circuit is United States v. Deutsch, 451 F.2d 98 (2nd Cir. 1971), cert. denied, 92 S.Ct. 682. The Court held:

"To sustain the conviction of one who has been charged as an aider and abettor, it is necessary that there be evidence showing an offense to have been committed by the principal and that the principal was aided and abetted by the accused; it is not incumbent upon the prosecution, however, to prove that the principal has been either convicted or acquitted of the offense." 451 F.2d at 118-9.

For a thorough analysis on this point, see, United States v. Bryan, 483 F.2d 88 (3rd Cir. 1973) (en banc).

Petitioner does not claim that the prosecutor either failed to present evidence showing the commission of an offense by the principal or that the principal was aided and abetted by Petitioner. The fact that the principal was convicted of a lesser offense is wholly immaterial. Therefore, Petitioner's claim that his conviction violated due process must fail.

II

PETITIONER WAS NOT DENIED A FAIR HABEAS CORPUS
HEARING IN FEDERAL DISTRICT COURT BECAUSE HE ACTED WITHOUT
THE ASSISTANCE OF COUNSEL IN PREPARING HIS PETITION.

Petitioner also raises the issue as to whether he was "given a fair habeas corpus proceeding in the Federal District Court in view of the fact that he was denied the assistance of counsel."

Under the Criminal Justice Act of 1964, Congress has authorized the appointment of counsel to represent indigents in direct criminal appeals. 18 U.S.C.A. §3006 A Such authority has not extended as a matter of right to legal representation in collateral attacks on criminal convictions. As the Court stated in LaClair v. U.S. 374 F.2d 486 (7th Cir. 1967) :

"...appointment of Counsel for indigents in habeas corpus and statutory post conviction proceedings rests in the sound discretion of district courts unless denial would result in fundamental unfairness impinging on due process rights."

Furthermore, as stated in U.S. ex rel Worlow v. Pate, 411 F.2d 972, 974 (7th Cir. 1969) :

"The Courts have consistently held, however, that although the right to counsel has been

consistently expanded, it does not necessarily include the right of a prisoner to have an attorney prepare collateral attacks in post-conviction proceedings."

See also, U. S. ex rel Marshall v. Wilkens, 338 F.2d 404 (2nd Cir. 1964).

The Supreme Court has noted with approval the practice of the Federal Courts in exercising their sound discretion to appoint counsel in such post conviction proceedings only after such court determines, "that issues are presented calling for an evidentiary hearing." Johnson v. Avery, 393 U.S. 483, 487 (1969). See also Developments in the Law - Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1202-05 (1970); Federal Habeas Corpus: A Study in Massachusetts, 87 Harv.L.Rev. 321, 342-346 (1973).

The very nature of the Criminal Justice Act was from its inception, and case law so upholds, conceived with some very basic limitations such as are set forth in the Report to the Committee to Implement The Criminal Justice Act of 1964 (1965), House Document No. 62, 89th Congress, First Session at pp. 4-5:

"Two specific limitations on the scope and applicability of the new statute are imposed by the terms of the [Criminal Justice] act or made clear from this legislative history. First, the act does not apply in habeas corpus proceedings, in

proceedings to vacate sentences, brought under 28 U.S.C.A. § 2255 [Federal Custody; Remedies on Motion Attacking Sentence] or on any other proceeding of a similar character which is collateral to the original case."

There is, therefore, ample evidence to support the proposition that federal courts have discretionary authority to appoint counsel in collateral proceedings and Petitioner's claim must fail.

Conclusion

Petitioner's conviction for aiding and abetting assault with intent to rob, where the principal was not convicted for that crime, but pleaded guilty to a lesser offense, provides no basis for granting a writ of habeas corpus.

Petitioner was not entitled, as of right, to counsel in the habeas corpus proceeding nor did it in any way affect the fairness of such habeas corpus proceeding.

It is therefore respectfully requested than
an order be granted permitting Eric Kronfeld to withdraw
as assigned counsel for Petitioner-Appellant.

Respectfully submitted,


ERIC KRONFELD, ESQ.
Attorney for Petitioner-Appellant
1501 Broadway
New York, New York 10036
212-563-6440

JEFFREY L. LAYTIN
Of Counsel

APPENDIX

*Law Offices
Machat
&
Kronfeld*

MARTIN J. MACHAT
ERIC KRONFELD
JEFFREY LAYTIN

30TH FLOOR
PARAMOUNT BUILDING
1501 Broadway, New York, N.Y. 10036
LONGACRE 3-6440
CABLE: "MARTMACHAT, NEW YORK"

April 15, 1974

Mr. Bernard Matthews
c/o State Correctional Facility
State of Vermont
Windsor, Vermont

Re: Matthews v. Moeykens
United States Court of Appeals
Second Circuit
Docket No.: 74-1032

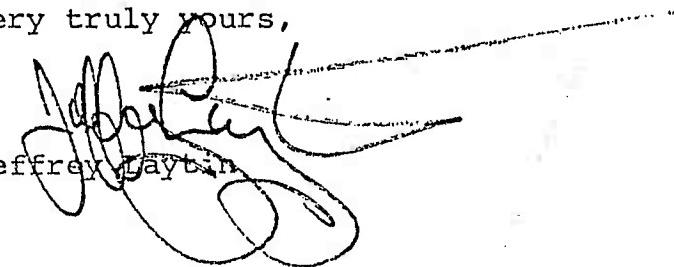
Dear Mr. Matthews:

Pursuant to the Criminal Justice Act of 1964, Eric Kronfeld, Esq., has been appointed to represent you in the above referred to matter.

Please be advised that as of this date a motion has been made to the United States Court of Appeals for the Second Circuit to have Eric Kronfeld, Esq. relieved as counsel on the ground that the case does not present any non-frivolous issue for appeal.

Enclosed herein, please find a copy of a revised Memorandum of Law superseding that sent you on April 1, 1974, explaining the nature of and reasons for said motion.

Very truly yours,


Jeffrey Laytin

Enclosure

h

UNITED STATES DISTRICT COURT

FOR THE,

DISTRICT OF VERMONT

Bernard Matthews }
v. }
Julius Moeykens }

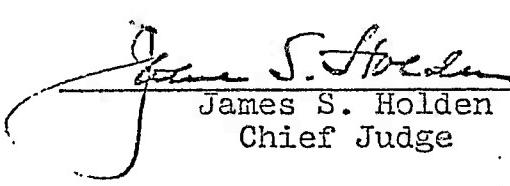
Civil Action

File No. 73-301

ORDER ON REQUEST FOR CERTIFICATE OF PROBABLE CAUSE

Petition having been brought pursuant to Rule 22,
Fed. R. App. P. for a certificate of probable cause so as
to permit appeal to the U.S. Court of Appeals for the
Second Circuit from the judgment entered in District Court,
I do certify that there is probable cause to appeal, and in
view of the indigence of petitioner that the appeal should
be carried forward in forma pauperis.

Dated at Rutland, in the District of Vermont, this
29th day of November, 1973.


James S. Holden

Chief Judge

Filed November 29, 1973

Christine M. Welberg
Deputy Clerk

United States District Court
For The
District of Vermont

Bernard Matthews
v.

Julius Moeykens

Civil Action

File No. 73-301

Request for Certificate of Probable Cause

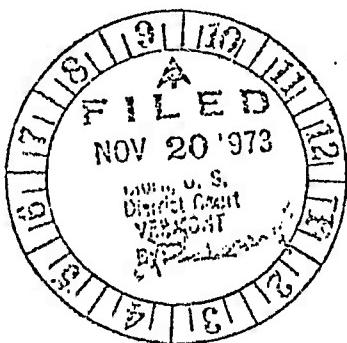
Now Comes Bernard Matthews, Petitioner in the above entitled action, and request the Honorable Court pursuant to Rule 22, F.R. App. P., for a certificate of probable cause to appeal the judgement of this Court rendered November 9, 1973, to the United States Court of Appeals for the Second Judicial Circuit. The issues which petitioner wishes to appeal are the following:

1. Was Petitioner's conviction invalid under the "Due Process Clause" of the Fifth Amendment to the United States Constitution, because he was convicted as an accessory to a felony, when the principal of the crime was convicted for a misdemeanor?
2. Was petitioner given a fair habeas corpus proceeding in the Federal District Court in view of the fact that he was denied the assistance of counsel?

Petitioner appeals these issues in good faith, believing that they are meritorious and non-frivolous.

DATED at Windsor, Vermont, this 18 day of November, 1973.

Bernard Matthews
Bernard Matthews, Pro se
Box 26
Windsor, Vermont



United States District Court
For The
District of Vermont

Bernard Matthews

v.

Julius Moeykens

Civil Action

File No. 73-301

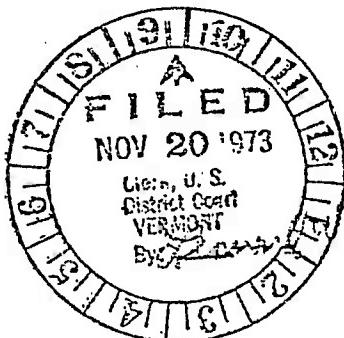
Notice of Appeal

Bernard Matthews, Petitioner, hereby gives notice that he will appeal the order handed down by this Court on the 9th day of November, 1973, to the United States Court of Appeals for the Second Judicial District, Foley Square, N.Y., N.Y.

DATED at Windsor, Vermont, this 18 day of November, 1973.

Bernard Matthews

Bernard Matthews, Pro se
Box 26
Windsor, Vermont



UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT:

Bernard Matthews
v.
Julius Moeykens

Civil Action
File No. 73-301

ORDER

This order relates to a petition for a writ of habeas corpus which has been filed by Bernard Matthews, who is an inmate at Vermont State Prison. In his petition Matthews states that he was convicted, after a trial by jury, of "aiding and abetting assault with intent to rob," in violation of 13 V.S.A. § 605, and was sentenced on June 2, 1972, to serve three to ten years in prison. That sentence was suspended. Matthews is currently confined under another conviction. His conviction on the §605 violation was affirmed by the Vermont Supreme Court on October 2, 1973. In addition to seeking a writ of habeas corpus, Matthews has filed a motion to proceed in forma pauperis.

Petitioner contends that his conviction under § 605 violated due process because the principal of the crime which he was accused of aiding and abetting was not convicted of that crime, assault with intent to rob, but rather was convicted of a lesser offense, operating a motor vehicle without the owner's consent. In support of his claim, petitioner contends that "if the principal is acquitted there can be no prosecution of the accessory."

While it is true that at common law the conviction of the principal offender was a necessary precondition to the

conviction of any accessory, this rule has been abolished by statutes in most jurisdictions which make an accessory liable in effect abrogating the distinction between principals and accessories. See LaFave and Scott, Criminal Law 500-501 (1972). Vermont has enacted such a statute, 13 V.S.A. § 3, which at the time of petitioner's conviction provided:

"A person who aids in the commission of an offense punishable by death or imprisonment in the state prison shall be punished as a principal."

Assault with intent to rob is punishable by imprisonment in the state prison. 13 V.S.A. §§ 605, 606. Thus under 13 V.S.A. § 3 petitioner's conviction as an accessory may stand even if the principal offender was not convicted. In aiding the commission of assault with intent to rob, Matthews, under 13 V.S.A. § 3, became subject to criminal liability independent of other participants in the crime.

In any event, petitioner does not claim that the principal offender in his case was acquitted. Matthews merely claims that the principal was convicted on a reduced charge. It is, of course, necessary "for the prosecution to show, on trial of the accessory, that the crime was committed, as well as whom and how the defendant aided in its commission."

LaFave and Scott, Criminal Law 501 (1972). Matthews does not contend that his trial lacked such evidence.

In consideration of the above, it is hereby ORDERED:

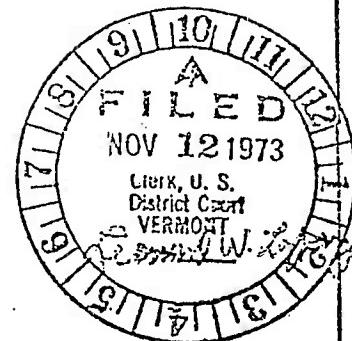
The motion of the petitioner to proceed in forma pauperis is granted.

The petition for a writ of habeas corpus is denied.

Dated at Montpelier, in the District of Vermont, this

9th day of November, 1973.

James S. Holden
James S. Holden
Chief Judge



United States District Court
For The
District of Vermont

Bernard Matthews
v.

Julius Moeykens

Civil Action File No.

Petition for a Writ of Habeas Corpus

Bernard Matthews, Petitioner, moves the Honorable Court to issue it's Writ of Habeas Corpus, and presents the following:

Jurisdiction

1. This Court has jurisdiction under Section 2241 of Title 28, U.S.C.
2. Petitioner has attempted post-conviction relief in state court, but there is no remedy available to him because he does not satisfy the "in custody" requirements under Vermont Law. See: petitioner's exhibit 'A'

Facts

3. Petitioner was convicted by jury trial for the crime of "aiding and abetting" assault with intent to rob", in violation of Sec. 605, Title 13, V.S.A. in the Vermont District Court, Addison Circuit, and was sentenced on the 2nd day of June, 1972, to serve not less than three (3) years and not more than ten (10) years in prison. The sentence was suspended with the condition that he leave the State of Vermont, Mittimus appended hereto as exhibit 'B'.
4. Petitioner is presently confined in the State Correctional Facility, at Windsor, Vermont, pursuant to another mittimus.
5. Defendant Julius V. Moeykens, is the Superintendant of said facility and has immediate control over petitioner.

Claim

6. Petitioner alleges that he is confined in violation of the Constitution of the United States and more particularly the "due process clauses" of the Fifth and Fourteenth Amendments thereto in that; the Vermont District Court was without jurisdiction to convict and sentence him for the heretofore described crime.
7. Petitioner claims that under the common law, and under the statutory laws of the United States and the State of Vermont, there must be a principal of a crime if there is to be an accessory.

8. The principal of the crime to which petitioner was alleged to aid and abet, was one Donald Goodrich. Mr. Goodrich, was convicted of "Operating without the Owner's Consent", a misdemeanor.

9. Petitioner claims that under the federal law; "If the principal is acquitted there can be no prosecution of the accessory". U.S. V. Pyle, 279 F 290., Rooney v. U.S. 203 F 928.

10. Because of the foregoing petitioner, prays that this Court will find fact in his favor and Order him discharged from custody.

Respectfully Submitted
Bernard Matthews,
Box 26

- Windsor, Vermont

The foregoing allegations were sworn to as the truth before me this 1st day of October, 1973, at Windsor, County of Windsor, State of Vermont.

Notary Public.

Paul W. Silver

Exhibit

STATE OF VERMONT
WYNDOR COUNTY, S. S.

BERNARD MATTHEWS

WYNDOR COUNTY COURT

vs

JULIUS V. MOEKENS

DOCKET NO. 637-73-WRM

CJ-73-WRM

JUDGMENT ORDER

The above entitled cause, A Petition for a Writ of Habeas Corpus, came on for hearing before the Windsor County Court on 18 July 1973. The Petitioner was present in Court and represented by George E. Rice, Jr., Deputy Defender General; the Petitionee was represented by Richard Finn, Esquire, Assistant Attorney General.

Petitioner represented to the Court that since the filing of his Petition for a Writ of Habeas Corpus for release from his incarceration as the result of a sentence from the Vermont District Court, Circuit 2, Addison Circuit, he has been convicted of the crime of Arson by the Vermont District Court, Rutland Circuit and in April of 1973 was sentenced by that Court to a term of three (3) to ten (10) years.

Petitioner pro se in open Court, following the above representations, requested the Court to assign to him a different attorney as George E. Rice, Jr. was one of the persons named in allegation NO. 19 in his Petition for a Writ of Habeas Corpus.

Upon consideration of the Petition, the file, records and oral representations of the Petitioner the Court makes the following findings of fact:

FINDINGS OF FACT

1.) Petitioner was convicted of aiding and abetting one Donald C. Goodrich while said Goodrich was armed with a dangerous weapon, to wit, a .22 caliber revolver to assault one Ralph Sampson with intent to rob said Sampson of personal property, to wit, a 1969 Oldsmobile sedan, then and thers in the possession of said Sampson, in violation of 13 V S A 3 and 605.

JUL 1 9 1973
LANE M. NEWMAN
WYNDOR COUNTY CLERK
NOTICED AND FILED COPY

FILED

2.) Petitioner was sentenced by the Vermont District Court, Addison Circuit to not less than three (3) years nor more than ten (10) years, which sentence was suspended upon the condition that Petitioner leave the State of Vermont.

3.) Petitioner appealed the Judgment and Sentence to the Vermont Supreme Court where the same is pending.

4.) Petitioner filed a Writ of Habeas Corpus with the Windsor County Court on 15 March 1973 contesting the jurisdiction of the Vermont District Court, Addison Circuit.

5.) On 15 March 1973 Petitioner was convicted of Arson in the Vermont District Court, Rutland Circuit and in April 1973 was sentenced to three (3) to ten (10) years. He is presently incarcerated at the State Prison in Windsor, Vermont on that sentence.

CONCLUSIONS OF LAW

It is well settled that a prisoner has no right to a Writ of Habeas Corpus unless he is entitled to immediate release. In Re: Bryant 129 Vt 302, 306

Assuming arguendo that Petitioner was entitled to release under his Petition for Habeas Corpus, he is serving a sentence for another offense meted out by another Court, and under such existing conditions could not be eligible for immediate release in any event.

An order for the assignment of different counsel to represent Petitioner is no longer appropriate.

JUDGMENT ORDER

It is thereupon Ordered that Petitioner's Petition for a Writ of Habeas Corpus is dismissed and Petitioner is remanded to the Custody of the Commissioner of Corrections and/or Julius Moeykens, Warden, Vermont State Prison.

A Copy of these findings, conclusions of law and judgment order are to be furnished forthwith to Petitioner, Petitioner's Attorney, Attorney General and

JUL 19 1973 Julius Moeykens, Warden.

JANE W. NORMAN
WINDSOR COUNTY CLERK

The findings, conclusions of law and judgment order are all made a part of
the record for the purpose of review by the Supreme Court.

Dated at Woodstock, County of Windsor & State of Vermont this 19th day of
July, 1973.

J. Bernard Taylor

J. Bernard Taylor

George M. Nelson

JUDGES, WINDSOR COUNTY COURT

CONFIRMED 800

FILED

JUL 19 1973

JANE W. NOTMAN
WINDSOR COUNTY CLERK

(3)

Holographic copy

Because the Petitioners' sentence was suspended, there is no mittimus at the prison to supply as an Exhibit.

The Vermont District Court sentenced petitioner to serve not less than three (3) years and not more than ten (10) years.

The sentence was suspended with the provision that petitioner leave the State of Vermont.

The sentence was given by Judge Hilton Dier, in the District Court, Addison Circuit, on June 12, 1972.

Bernard Matthews
Box 26
Windsor, Vermont

Exhibit 'B'

Lindsay Brink, Court
Docket No _____

Petition for a "Writ of Habeas Corpus"

... Petitioner affirms, Recitation in the above entitled cause, and move
the Court to issue its "Writ of Habeas Corpus," and shows the Court
that it is so.

... is action arises under the First, Fifth and Fourteenth Amendments
to the United States Constitution, as will hereinafter more fully appear.

... jurisdiction of this Court is invoked under Sections 3951-55, of
Vermont Statutes annotated.

... Petitioner is presently confined in the State Correctional Facility at
Rutland, Vermont, because he is unable to supply bail in the amount required by
the District Court, Rutland Circuit.

Jurisdiction

... Petitioner is not presently physically confined because of the conviction
above described, however, Petitioner right to go where and when he pleases
is restricted by the heroin enhanced conviction.

In 1863 the United States Supreme Court took care to explain the requirements
of custody, as far as the requirements to be entitled to the "great writ."

In Jones v. Cunningham, 671 U.S. 265, 260 (1863) the Court said;

"... history, usage, and present can leave no doubt that, besides
physical imprisonment, there are other restraints on a man's liberty,
not ~~of~~ ^{and} shared by the public generally which have been thought
sufficient in the English speaking world to support the issuance of habeas
corpus."

"... that matter is that they significantly restrain petitioner liberty to do
those things which in this country free men are entitled to do. Such restraints
are enough to invoke the help of the "great writ".

Statement of the Case

... Petitioner was on the 25th day of April 11, 1972, convicted by a jury trial
of "Arson and Abetting armed robbery," in violation of section
145, 146, 147, 148, at the Vermont District Court, Bennington Circuit. Petitioner
was sentenced (one year to three years): not less than three years and not more
than one year in State Prison.
The Court, however, suspended the sentence with the provision that the Petitioner
live the state of Vermont. The sentence at this time is still in the stat. of
being pending.

BEST COPY AVAILABLE

C 6. The conviction has been appealed to the Vermont Supreme Court and is scheduled to be argued sometime in April, 1973, to the Office of the Reporter (SSCR--), General docket No. 100-72.

The assistant defendant Counsel will now return the appeal to the State's Attorney, who will then have the opportunity to file a brief.

Petitioner is a layman and inexperienced, and is without adequate facilities to prepare his own brief. In view of the fact that the Supreme Court of Vermont is very busy, it is felt that the Petitioner should somehow file briefs with the Supreme Court and the State would necessarily require more time to oppose him and the appeal would be dragged out infinity.

Allegations

7. The Petitioner alleges that the trial court was without jurisdiction to try, convict, and sentence him for the crime of "Aiding and Abetting Armed Robbery", as any trial for that crime would be a plain violation of the Petitioner's rights under the Fifth Amendment to the United States Constitution to be free from Multiple Prosecutions for the Same Offense.

C 8. Petitioner further alleges that above described prosecution was intended and designed to punish the Petitioner because he had the nerve to exercise his inalienable right to petition the Courts of Justice for relief.

O 9. Petitioner further alleges that the above described prosecution was in truth persecution, and (sic) violated the basic, fundamental concepts of the equal protection of the law commanded by the Fourteenth Amendment to the Constitution of the Fourteenth Amendment of the United States.

P 10. The facts surrounding the Petitioner's allegation, are that, Petitioner was arrested on May 16, 1971, at Middlebury, Vermont and charged with the crime of aiding and abetting one Donald Goodrich in the assault with intent to rob, one Ralph Sampson on May 15, 1971.

On August 9, 1971, the State dropped the charge of Assault with intent to Rob and allowed the Petitioner to plead guilty to the crime of "Aiding and Abetting operating a car without the owner's consent."

The sentencing court sentenced the Petitioner to serve nine months in prison for the crime.

Y The principle, Donald Goodrich, entered a plea of guilty to the reduced charge of "operating without the owner's consent."

II. Petitioner subsequently filed Motion to Vacate Sentence in the Addison County Court, and on February 9, 1972, the Court through out the conviction on the ground that a person cannot be convicted as an accessory to a misdemeanor.

12. Over the objections of the Petitioner the Vermont District Court, Addison Circuit, allowed the State to re-instate the original charge that had been dropped and the Petitioner was tried for "aiding and abetting assault with intent to rob."

13. Petitioner contends that once the State dropped the charge and allowed the Petitioner to plead to a lesser offence the State was barred from a subsequent prosecution for the (sic) greater offence.

It was said by the Court in *Skoerg V. U.S.* 167 F2d 380, 386 (1948) that

"The conviction and sentence for the lesser included offence would constitute a bar, under the double jeopardy clause of the Constitution, to a subsequent prosecution for either the greater or lesser included offence involved in the same transaction."

14. Petitioner contends (since the charge of "assault & intent to rob" was dropped against the principal, Donald Goodrich), and the principal was convicted of "operating without the owner's consent," it was equivalent to an acquittal on the first charge.

15. As the effect of this prosecution the Petitioner was named an accessory, and was entitled to be prosecuted as such. The common law distinction between principals and accessories has been largely, if not abolished under federal law by section 1 of Title 18 of the United States Code, and now for all practical purposes only accessories are liable for punishment. (Shelby v. U.S. 75 Fid 100) It is unnecessary that the principal be first prosecuted or convicted before prosecution of an accessory. (Kaufman v. U.S. 212 Fid 13) But sensible if the principal is (~~is~~) acquitted there can be no prosecution of the accessory. (U.S. v. Pyle, 279 F2d 50, recently 36 U.S. 203 F2d 528.)

16. Because of the foregoing, Petitioner claims that the principal was acquitted of the prime charge, and thus the Court was without jurisdiction to try the Petitioner as an accessory.

C 17. Petitioner claims that the equal protection clause of the 14th Amendment means equal punishment according to the offense.
In this case the principal, Mr. Donald Goodrich, was given a sentence similar to the petitioner for the crime of "operating without the owner's consent," which was equivalent to one year in jail. However Mr. Goodrich having a long record, and being accustomed to dealing with Vermont Authorities, promised the Parole Board that he would be an Informer for the State, and was immediately paroled. Mr. Goodrich did less than 90 days in jail for this crime.

O Petitioner, not using an informer, would have to do the entire sentence, and naturally when he petitioned the Courts of Justice for relief, the State felt they were duty bound to make an example out of an American Citizen that dared to exercise his rights under the First Amendment to Petition the Courts Justice for a legal finding of fact.

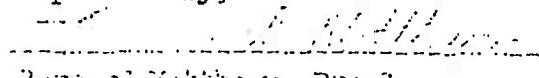
P 18. Petitioner properly objected to the trial on the grounds set forth in this petition, as will appear by Petitioner's Exhibit A;

The Printed Case now on file with the Vermont Supreme Court, appended to this Petition.

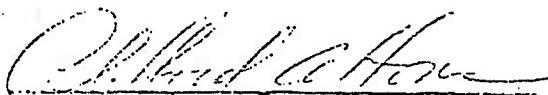
Y 19. Because the Public Defender, Mr. Karl Krauss, and the (~~is~~) Assistant Defender General Mr. George Rice Jr., vows as members of the Vermont Bar, and have ridiculed their own code of ethics as lawyers, and have chosen to prosecute the star chamber prosecution of this innocent person, Petitioner asks the Hon. Vt. Ct. to appoint him counsel not connected with the Public Defender's Office.

... which may prohibit any or all the Courts from giving effect to the Petitioners' rights. A copy of the Bill of Rights described will find that the Petitioners' case does not have the guarantee of law, of constitutional dimension requiring the protection to be vindicated.

RESPONDENT,


Bernard Matthews, P.C. B.C.
B.C. P.C.
Windsor, T.B.

The foregoing allegations were subscribed and sworn to as the truth before me this 2nd day of March, 1973, at Windsor, Ontario.


Clifford C. Horne
Justice of the Peace

Petition prepared by:

William H. Mayer

United States District Court
For The
District of Vermont

Bernard Matthews

v.

Julius Moeykens

Motion for leave to proceed
in *forma pauperis* and for
Appointment of Counsel
Docket No.

Petitioner Bernard Matthews, moves this court for an order permitting him to file this action in *forma pauperis* without prepayment of fees and costs or security therefore, and appointment of a member of the Vermont Bar, to represent petitioner as provided in 28 U.S.C. Sec. 1915, because as the attached affidavit indicates, petitioner is unable to pay such costs or give security therefore; and cannot afford to employ an attorney. This motion is based on the petition for Writ of Habeas Corpus and affidavit attached hereto and submitted herewith.

DATED at Windsor, County of Windsor, State of Vermont, this 10 day of October
1973.

Bernard Matthews
Bernard Matthews
Box 26
Windsor, Vermont 05089

Christine M. Wilberg
Deputy Clerk

In The United States District Court
For The
District of Vermont

Bernard Matthews

v.

Julius Moeykens

State of Vermont

Windham County

ss:

Civil Action File No.

Affidavit

Bernard Matthews, being duly sworn deposes and says:

1. I am the petitioner in the above entitled action.
2. I believe I am entitled to the relief sought in the attached petition against the above named defendant.
3. I have read and know the contents of the attached petition for writ of habeas corpus and know them to be true in as far as I am able to ascertain.
4. Because of my poverty I am unable to pay the costs necessary of an action or to give security therefore, or to employ an attorney.

Bernard Matthews

Bernard Matthews

Subscribed and sworn to before
me this 10th day of October, 1973.

Notary Public

Paul W. Silver

STATE OF VERMONT

DISTRICT COURT OF VERMONT, UNIT NO. 2 Addison CIRCUIT

CRIMINAL DOCKET AND RECORD NUMBER 301-71-2.c2

Entered May 16 1971

Date of birth 9/17/45 Age 25

State vs. Bernard F. Matthews Place of birth Sommerville, Mass.

Residence Sommerville, Mass. Occupation Construction Worker

Offence or crime A&A Assault w/intent to kill Op. Lic. No.

Appointed Guardian Ad Litem

Prosecuted by { State's Attorney Dike Indicate Guilty 5/17/71 And Not guilty
 Grand Juror plea Not guilty 5/17/71
 by X Nolo Contendere.

Counsel for respondent Deppman Bail \$ 5,000 Sureties

Continued

to 19 Date of trial by } (1) Court 19

Judgement or verdict guilty Date 2/8 1971 (2) Jury 19
Bound

Sentence 5/17/71 Probationary 9 months from 1st hearing if (3) over to

Condition

Fine of \$ and Cost of \$ were paid 19

Alternative sentence
Date of Report to Department of Motor Vehicles - Public Safety 2/8 1971 Mittimus-Jail-Probation 2/8 1971

On 19 sentence was suspended and respondent placed on probation on the usual and following special condition

Other proceedings 1/11/71 Bail hearing - reduction denied. Pre-trial order for 6/14/71 Deposition of Sgt. Law, Twp. Herring & P. Weyman filed 7/2/71.
Motion for transcript filed 9/1/71 - denied w/o fee.

2/10/72 Order from Addison Co. Court - respondent indicted, plea of guilty struck, case returned to Dist Ct. for further action - 5 sec. civil suit reinstated 2/17/72 Not guilty plea entered. State's motion of strike against guilty original charge reinstated 2/23/72 Bail hearing 4/17/72 Motion filed - charges reinstated subsequently withdrawn same date. Set for jury drawing 4/24/72.

A TRUE RECORD

Attest:

Judge - Clerk

STATE OF VERMONT

DISTRICT COURT OF VERMONT, UNIT NO. CIRCUIT

CRIMINAL DOCKET AND RECORD NUMBER 261-71-145

Entered 2/17/72 Date of birth Age

State vs. Deanne E. McNeil Place of birth

Residence Occupation

Offence or crime A & A assault w/ intent to kill Op. Lic. No.

Appointed Guardian Ad Litem Christian J. Baldwin County Court 2/10/

Prosecuted by State's Attorney Indicate GuiltyGrand Juror plea X Not Guilty 2/17/72

by X Nolo Contendere

Counsel for respondent Please, assign me Bail \$ Sureties

Continued

to 19 Date of trial by (1) Court 19

Judgement or verdict guilty Date 4/25/1972 (2) Jury 4/25/1972

Judgment on Verdict 5/22/72 Bound

Sentence 1/6/2/72 Not less than 3 years over to

more than 10 yrs State Prison at Windsor

Fine of \$ and Cost of \$ were paid 19

Alternative sentence

Date of Report to Department of Motor Vehicles - Public Safety 19 Mittimus-Jail-Probation 19

On June 2, 1972, sentence was suspended and respondent placed on probation on the usual and following special condition. that respondent shall leave St. of Vt. or Canadaas legally able to do so & shall not return to St. of Vt. w/o written permission of Director of Division of Probation & Parole of Dept. of Corrections.
Other proceedings 4/12/72 Respondent's motion to disqualify, continuance, hearing & memorandum filed. Hearing on Motions - all motions denied 4/24/72Jury drawing continued to 4/25/72. Judgment stayed for filing of motion to 5/12/72. Time extended to 5/15/72. Motion for Judgment Notwithstanding Verdict or Judgment of Acquittal filed 5/15/72. Motion for New Trial filed 5/15/72. Hearing 5/22/72 on both motions denied as to both. Judgment on Verdict entered 5/22/72. Pre-sentenceordered. Pre-sentence filed 6/1/72. Sentencing 6/2/72. Notice of appeal filed 6/12/72. Order for transcript A TRUE RECORDfiled 6/15/72. File &ocket Arrest: J. P. C. 12/1/72entries forwarded to Supreme Court 6/20/72. Judge Clerk20 M-2-70 entries forwarded to Supreme Court 6/20/72. Judge Clerk

MITTUS TO HOUSE OF CORRECTION

STATE OF VERMONT.

Addison County, ss.

To ANY SHERIFF OR CONSTABLE IN THE STATE.

GREETING:

WHEREAS, Bernard F. Matthews of Somerville, Mass. in the County of Addison by consideration of the Vermont District Court, Addison Circuit Court was on the 9th day of August, 19 71 duly convicted of the crime of aiding & abetting operating without owner's consent.

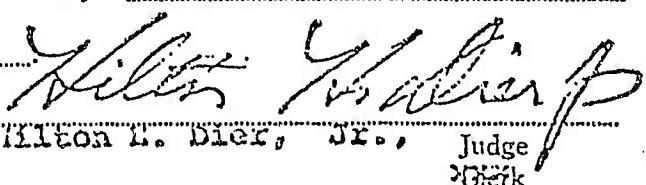
and was thereupon by said Court sentenced to be confined, at hard labor, in the House of Correction, in Windsor, in the County of Windsor, for and during the term of ~~more than twenty years~~ months, days, no more than years 9 months days, from the date of commitment of said Bernard F. Matthews to said House of Correction;

and to stand committed until sentence is complied with; therefore:

By THE AUTHORITY OF THE STATE OF VERMONT, you are hereby commanded forthwith to commit the body of the said Bernard F. Matthews to the Superintendent of the House of Correction, in Windsor, in the County of Windsor, within such House of Correction, who is hereby commanded to receive the said Bernard F. Matthews and him confine and employ at hard labor, in said House of Correction, strictly in accordance with such sentence, or until he is sooner discharged by order of law.

HEREOF FAIL NOT, BUT DUE SERVICE AND RETURN MAKE ACCORDING TO LAW.

Dated at Middlebury in said County of Addison this 9th day of August, 19 71


Milton H. Dier, Jr., Judge
Dier

STATE OF VERMONT,

At Middlebury in said County, this
Addison County, ss. } 9th day of August, 1971, by virtue of
this mittimus I apprehended the body of the within named Bernard F. Matthews
and read the same in his hearing; and on the 9th day of August, 1971, at
Windsor, in the County of Windsor, I committed the said Bernard F. Matthews
to the Superintendent of the House of Correction, within said House of Correction, and left with said Superintendent
a true and attested copy of this mittimus, with this, my return thereon endorsed.

Attest

Gary W. Bushay
Deputy Sheriff - Constable

FEES:

Travel miles \$ A True Copy, Attest Gary W. Bushay
Two copies, \$ _____
\$ _____

Docket No.

MUNICIPAL COURT

STATE OF VERMONT

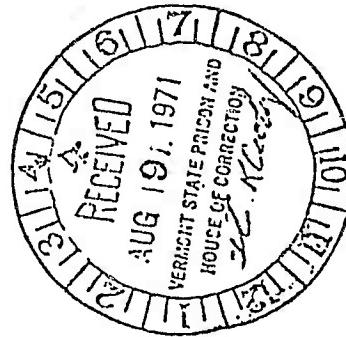
vs.

MITTIMUS TO
HOUSE OF CORRECTION

TERM OF SENTENCE

Minimum

Maximum



FOR THE COURT

DATE: May 31, 1972

P.O. Marcus A. Carr

TO: Vermont District Court
Addison Circuit, Unit No 2
Middlebury, Vermont
Judge Hilton H. Dier

DEFENDANT: Bernard Frederick Matthews DOB: September 17, 1945

RESIDENCE: 106 Baldwin Road AGE: 26 years
Billerica, Massachusetts POB: Sommerville, Mass.

OFFENSE: Aiding & Abetting Assault
With Intent to Rob (felony) PLEA: Not Guilty

STATE'S ATTORNEY: Ezra S. Dike DOCKET NO: 801-71acr

DEFENSE ATTORNEY: Carl Neuse

DATE CONVICTED: April 25, 1972 - Jury Verdict
of Guilty

COMPLAINT:

On to wit, the 15th day of May AD, 1971 did then and there aid and abet one Donald C. Goodrich, while said Goodrich was armed with a dangerous weapon, to wit, a .22 caliber revolver to assault one Ralph Sampson with intent to rob said Sampson of personal property, to wit, a 1969 Oldsmobile Sedan, then and there in the possession of said Sampson, in violation of 13 VSA 3 and 605.

ARREST SUMMARY:

Following is a summary of state police case no. 357-512:

At 3:19 p.m. on May 15, 1971 the State Police at Rutland, Vermont received a Complaint by phone from Sampson of Ripton that his car had been stolen. The message was relayed to the Middlebury State Police, and Trooper Michael Herring was assigned. He proceeded to the Robert Dragon home in Ripton, Vermont and met with the victim.

Mr. Sampson stated that "Topper" Goodrich had threatened him with a gun, and had ordered him out of the car. He said that Bernard Matthews had gotten into the back seat, and that Matthews had struck him (Sampson) on the back of the head.

Trooper Herring gave this information to all cars; at 4:45 p.m.
Sgt. Walter Lemaire located the car parked on US Rt. 7, one half mile
south of the State Police Barracks, in Middlebury. Sgt. Lemaire arrests
Goodrich for Operating Without the Owner's Consent on an Officer's
Complaint.

Matthews was arrested for intoxication by Corporal Dillly and was in
possession of a weapon at this time. The weapon was one fully loaded
ARCOA .22 caliber revolver, serial number 018251. At the time of their
arrest both subjects were sitting in a 1963 Oldsmobile 4 door, model 88,
registered to Ralph Sampson.

On May 16, 1971 Bernard Matthews was charged in an Information & Warrant,
issued by Ezra S. Dike, of aiding and abetting assault with intent to rob.
The charge was reduced to aiding and abetting operating without the
owner's consent, and Bernard Matthews was sentenced to not more than one
year to the Windsor State Prison.

On an appeal the case was remanded back to the Court, and the original
Warrant was reinstated. On February 17, 1972 Bernard entered a plea of
Not Guilty, and the case was continued for trial.

The trial was held on April 24 and 25, 1972, and on April 25 the Jury
returned a verdict of Guilty.

The Judge continued the case until May 12 for the filing of motions, and
on May 12 the time was extended until May 15. On May 22 a Hearing was
held on the motions, one for judgement of innocent, notwithstanding
the verdict, and another motion for a new trial. Both motions were denied,
and on May 25 Judge Hilton H. Dyer entered judgement on the verdict, and
ordered a presentence investigation.

DEFENDANT'S VERSION:

The following is a summary of the statement given to this Officer by
Bernard Matthews:

Bernard stated that this was not an armed robbery. He stated that "Topper"
Goodrich had known this man for sometime, and that he was merely riding
with "Topper". He said that he did have a gun at the time, but that no
threats were made, and that he does not recall at any time hitting
Mr. Sampson.

He admits that he was highly intoxicated at the time of incident, and
remembers the events only in a vague sort of a way.

CONVICTION RECORD:

The Criminal Index in Vermont discloses no record on this subject.

A record check with the State of Massachusetts discloses the following:

On January 20, 1967, Breaking & Entering in the Nighttime with Intent to Commit a felony. Sentenced to 18 months in the House of Correction.

October 27, 1969, Breaking & Entering, Larceny, two years Plymouth House of Correction (Mass.), suspended. Suspension revoked January 20, 1969, and committed to two years at the Plymouth House of Correction.

October 1, 1970, Escape, sentenced to two months concurrent with the sentence he was then serving.

According to Mr. William Sollen, Parole Officer/Supervisor, Bernard had six months to serve for his violation of Parole, but the parole has now run out, and they do not want him on this violation.

FAMILY HISTORY:

Father: Bernard F. Matthews, Sr., age 52, was born in Charlestown, Massachusetts. He attended Sommerville schools, and graduated from Sommerville High in 1937. He is presently a helper around the Beer truck, having worked for the Company for the past twelve years. He has always been in good health, and he has served in the European Theater in the United States Army during World War II for forty-four months.

Mother: Lillian (Francq) Matthews, age 50, was born in Mons, Belgium. She married Mr. Matthews in Belgium in 1947 and came to the United States with him. She had no health problems. There were two boys as a result of this marriage. She sought and was granted a divorce in Los Vegas in 1964. She visited the home last summer, but has lived in Mons, Belgium since the divorce.

Brother: Eugene Matthews, age 24, was educated in the Sommerville schools, and graduated from Sommerville Trade School. He is a cabinet maker by trade, married and has one child. He has never had any trouble with the law.

PERSONAL HISTORY:

Bernard F. Matthews, Jr. was born on September 17, 1945 in Sommerville, Massachusetts. He had only the usual childhood diseases, and at present he has no health problems.

He attended elementary school in Sommerville, Massachusetts, obtaining B's and C's and was truant only a few times. He attended the Northeastern Junior High School where he maintained simular grades, played basketball for two years.

Towards the end of the ninth grade, he dropped out because "it didn't agree with him". His father states that he began working mostly doing odd jobs, and during the good weather he worked doing house painting for contractors.

He never held any one job for very long, however, and has maintained job pattern through the years.

According to the father, he is rather good natured, and it would not be unusual for him to visit his fourteen cousins and give them each a dollar when he was working. He has never served in the Armed Forces, and was not called in the Draft, though he is physically fit.

His father says that he has had, maybe, a half of a dozen stolen car offenses, but he was never the driver, always the helper.

According to the father, he went for a ride to Vermont with a friend who wanted to collect some money owed to him. The debtor apparently had no money so the friend took his car, and the present Complaint resulted.

The foregoing information was received from an interview with Bernard's father by Probation Officer, McGraff, in Woburn, Massachusetts.

SUMMARY:

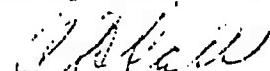
Bernard Matthews is before the Court for sentencing after having been convicted by a Jury of aiding and abetting assault with intent to rob. This is his first offense in Vermont, although he has been convicted of at least two Breaking and Entering offenses in Massachusetts, and one Escape offense in Massachusetts.

He has also been charged with Escape from the Correctional Facility in Rutland, Vermont. I feel that it should be brought to the Court's attention, that Bernard has already served over one year since having been arrested for this offense.

RECOMMENDATION:

It is respectfully recommended to the Court that any sentence imposed on Bernard Matthews be served. It is further recommended that credit be given on the sentence for the length of time that has already been served.

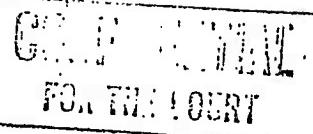
Respectfully submitted,



Marcus A. Carr
PROBATION & PAROLE OFFICER

MAC/jsh





PRESENTENCE REPORT

VERMONT DISTRICT COURT, UNIT #1
RUTLAND CIRCUIT

DATE: April 11, 1973

P.O.: Bert B. Barrett

JUDGE: E. G. McClallen, Jr.

DEFENDANT: Bernard Frederick Matthews, Jr. DOB: 9/17/45 AGE: 27

RESIDENCE: 241 Lexington Street POB: Somerville, Mass.
Woburn, Mass.

OFFENSE: Arson - First Degree PLEA: Not Guilty
Docket #1935-72Rcr

ASSISTANT STATE'S ATTORNEY: Stephen L. Klein

DEFENSE ATTORNEY: John Liccardi

DATE CONVICTED: March 8, 1973 Guilty Verdict - Trial by Jury.

ARREST SUMMARY:

The Vermont State Police received a call on 6/1/72 to investigate a fire in the cell block at the Rutland Community Correctional Center at 73 Center Street, Rutland, Vermont. Det. Lee Jones surveyed the damage done and interrogated the men in the cell block at the time of the fire (9:30 P.M. on 6/1/72). He took statements from several inmates who stated that the defendant and Steven J. Murray crumpled up newspapers and other pieces of paper and placed them behind the wooden doors between the cell block and the dining room. Then they lit matches and set fire to the papers which burned for approximately fifteen minutes causing damage to the doors, the walls and the ceiling and had to be extinguished by the Rutland Fire Department. The heavy smoke created had to be ejected, also.

The information was turned over to the state's attorney's office who brought the charge against the defendant.

Re: Bernard F. Matthews, Jr.

-2-

DEFENDANT'S VERSION:

The defendant was interviewed at the State Correctional Facility at Windsor and he stated that he was playing cards with some of the other inmates when the fire started and he didn't have anything to do with it. He also said that the inmate (Philip Morse) who said he saw him light matches and set the fire lied because he is crazy and can't think straight and shouldn't have been let out of the State Hospital to testify against him. He intends to have his lawyer file an appeal of the guilty verdict.

VICTIM'S STATEMENT:

Superintendent William D. White of the Rutland Community Correctional Center stated that the fire damaged the doors, walls and ceiling in the hallway leading to the cell block and seriously endangered the lives of the inmates.

He believes that the defendant has shown by his behavior and lack of cooperation that he is not a suitable person for community oriented rehabilitation programming.

CONVICTION RECORD:

The following information was furnished by the F.B.I., Washington, D.C.:

H of C Billerica Mass.	10/30/64	Using M/V W/O Auth	1 yr.
H of C Plymouth Mass.	10/29/69	B & E	2 yrs.
SPr & H of Corr for Men Windsor, Vt.	8/9/71	Aiding and abetting operating without owner's consent	0-9 mos.
Dept. of Pub. Safety Redstone, Montpelier	5/15/71	1. Aiding & abetting in armed robb. 2. Intox.	2. Guilty and po F of \$10.00

1. Amendment struck on 2/16/72
when case appealed gilty by jury
trial on 4/25/72 sent on 6/2/72
to not less than 3 yrs. nor more
than 10 yrs. State's Prison susp.
& placed on prob with special term
as soon as legally able to do so to
leave the state and will not return
without special written permission
by the Director of Division of
Parole Dept. of Corr.

Re: Bernard F. Matthews, Jr.

-3-

Dept. of Pub. Safety Redstone, Montpelier	3/12/72	Escape (from Rutland Corr. Center)	11/14/72 sentenced 0-2 ^{1/2} days with credit for 2 ^{1/2} days time served.
--	---------	--	--

In addition, the following information is from a record check in the State of Massachusetts contained in a Presentence Report prepared by P.O. Marcus A. Carr on 3/21/72 for Vermont District Court, Addison Circuit, Unit #2, Middlebury, Vermont:

- #1. 1/20/67 B&E, Nighttime with Intent to Commit a Felony. Sentenced to 18 months in the House of Correction, Plymouth, Mass.
- #2. 10/1/70 Escape from House of Correction, Plymouth, Mass. Sentenced to serve 2 months concurrent with conviction for B&E on 10/29/69.

He is still on probation in Vermont on the suspended 3-year to 10-year sentence handed down in Vermont District Court, Addison Circuit on 6/2/72.

FAMILY:

The following information was received from the defendant and from a Presentence Report prepared by P.O. Marc Carr on 3/31/72 for Vermont District Court, Addison Circuit, Unit #2, Middlebury, Vermont and was not verified:

Father: Bernard F. Matthews, Sr. was born in Charlestown, Mass. in 1920. He is a high school graduate and served honorably in the U.S. Army for 3 $\frac{1}{2}$ years in World War II.

He has worked as a truck driver most of his life and is currently employed.

Mother: Lillian Francq Matthews was born in Mons, Belgium in 1922. She married the defendant's father in Belgium and they returned to the United States and lived together until shortly after the birth of her second child by him.

She was granted a divorce in 1964 and returned to live in Belgium where she still resides.

The defendant has had no contact with her since 1964 until last summer when she visited him on a vacation trip to the United States.

Re: Bernard F. Matthews, Jr.

-4-

PERSONAL HISTORY:

Bernard F. Matthews, Jr. was born in Somerville, Mass. on 9/17/45. He attended public schools and dropped out near the end of ninth grade at age 16 because he didn't like school.

He hung around for a couple of years at home just loafing. He lived with his father, grandmother and brother after his mother left the home and his father supported them.

He enlisted in the National Guard in 1963 and was doing his six months tour of federal duty in 1964 at Fort Dix, New Jersey when he got involved in a drunken episode involving breaking the window of a liquor store that resulted in his being discharged after approximately four months of service.

He returned to Massachusetts to live with his family and worked sporadically at a number of jobs of short duration, such as, factory laborer, short order cook, construction laborer and house painter.

In 1971 he came to Vermont with a friend and got into trouble apparently because of a drinking spree which resulted in convictions for intoxication, aiding and abetting in armed robbery, escape, and arson, first degree. He has been detained in Vermont for lack of bail since May 15, 1971.

According to his statements, he has used intoxicating beverages to excess frequently in the past and he has used drugs quite frequently for about three years but doesn't feel he has a habit.

He stated he gets along well with his father and brother and intends to return to live with his father when he is released.

MARITAL:

He has no marital plans, at present.

FINANCIAL STATUS:

He has no assets of any kind, at the moment.

Re: Bernard F. Matthews, Jr.

-5-

SUMMARY:

The Court is concerned with an unmarried, twenty-seven-year-old high school dropout with little work experience and no apparent motivation to better himself. He admits to excessive use of alcoholic beverages and claims to have used drugs over a period of three years but not to the point that he has a habit.

He has previous convictions of a serious nature and has been incarcerated twice for felonies committed in Massachusetts. He has also been convicted twice of Escapo (Vermont and Mass.) and is presently on probation in Vermont on a suspended 3-year to 10-year sentence for aiding and abetting in an armed robbery.

He completed approximately four months of federal service on a National Guard enlistment before he was discharged for cause.

During the period of his detention in Vermont, he has not cooperated or shown any desire to change his attitude or behavior to better himself.

According to a statement made by his father to Mass. Probation Officer McGraff in Woburn, Mass. last year, the defendant is rather good natured and generous to his relatives.

RECOMMENDATION:

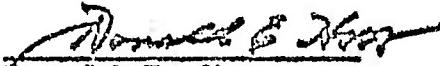
The defendant doesn't appear to be ready for placement in the community on probation; therefore, it is recommended that the sentence handed down in this case be served in a closely structured environment other than a regional correctional center.

Respectfully submitted,


Bert B. Barrett
Probation and Parole Officer

BBB:ve

Approved:


Donald E. Hess
Supervisor

1 STATE OF VERMONT
2 RUTLAND COUNTY, SS.

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4 STATE OF VERMONT DISTRICT COURT OF VERMONT
5 VS. UNIT #1, RUTLAND CIRCUIT
6 BERNARD F. MATTHEWS DOCKET NO. 1935-72-Rcr

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12 SENTENCING

13 APRIL 16, 1973

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23 APPEARANCES:

24 STEVEN L. KLEIN, ESQ., RUTLAND COUNTY DEPUTY STATE'S ATTORNEY.
25 JOHN S. LICCIARDI, ESQ., ATTORNEY FOR THE RESPONDENT.

1 COURT. Take up Docket No. 1935-72-Rcr,
2 State vs. Bernard F. Matthews, who is here with
3 Attorney, John Liccardi, the Public Defender. The
4 State is represented by Stephen Klein and Burt
5 Barrett, probation officer, is at the State's table.
6 There was a jury trial held on the 7th and 8th
7 of March, 1973. Mr. Matthews was charged with
8 first degree arson and verdict on 8th of March
9 of guilty and judgment of the verdict. Pre-sentence
10 was ordered. We have received it and discussed
11 it in chambers. Everyone has had a chance to read it.
12 Purpose of the hearing this morning is to impose
13 sentence. Mr. Klein.

14 MR. KLEIN. Your Honor is fully aware
15 of the facts in this case. It went to a full
16 and complete jury trial and the verdict was
17 entered on March 8, 1973 by the jury of guilty
18 as charged. You have here a man with extensive
19 record. A number of felony convictions. A
20 man who has been given a chance before and has
21 not proved himself capable to the task. You
22 have a man before you that is very, very
23 impulsive and acted out in a very, very violent
24 manner with something that he does not agree
25 with. I think there comes a time in Mr. Matthews

1 MR. KLEIN. case that the public has to
2 be protected , public has to be considered.
3 We have a pendulum that swings, maybe completely
4 to left when the person gets involved for
5 the first time with the law with the public's
6 interest on the right and the victim of the
7 crime on the left and whereas that party
8 refuses to follow the task of probation and
9 refuses to become a useful citizen in society
10 then the pendulum swings further toward the
11 side of the public and I think in this case
12 the pendulum is just about the other way.
13 While I have no specific recommendation, I
14 think, your Honor, is fully familiar with
15 the facts of the case and I think that in
16 the interest of justice public should be given
17 a fair shake in this matter.

18 COURT. Mr. Liccardi.

19 MR. LICCARDI. Your Honor, the Court is
20 aware of the facts. I think it should be
21 pointed out the public has an interest in
22 seeing that its citizens, who perhaps go off
23 the path , should be rehabilitated and brought
24 back and made meritorious members of the
25 society. I don't think that Mr. Matthews is
 any different in this matter. I think he is

1 MR. LICCARDI. human being and member of
2 society and although he may have gone wrong
3 "X" number of times in the past, society does
4 have an obligation to do what it can to see that
5 Mr. Matthews becomes a useful and meritorious
6 citizen and I would ask that the Court keep
7 this in mind when imposing sentence.

8 COURT. Mr. Matthews, would you stand up,
9 please? Mr. Matthews, is there anything that
10 you would like to state in your behalf?

11 MR. MATTHEWS. No, your Honor.

12 COURT. Mr. Matthews, as you understand,
13 this is very serious charge. The legislature
14 has seen fit to fix a penalty of not less than
15 two years nor more than ten years. We have
16 read your pre-sentence over very carefully.
17 We have noticed your list of previous
18 convictions and it seems to be a trend in
19 there that you more or less like to stay
20 incarcerated. We think that the seriousness
21 of this offense is such that probably should
22 get a great deal more of penalty then I am
23 going to give you but because your attorney,
24 Mr. Liccardi, has convinced me that regardless
25 of how I felt originally on here, that you

COURT. are entitled to be treated as a human being and given a chance fore rehabilitation, even though there doesn't appear to be so from the pre-sentence investigation. I am going to give you the opportunity to be rehabilitated after what I think is a reasonable length of time. Sentence of this Court is that you shall be committed to the care and custody of the Commissioner of Corrections for a period of not less than 3 years nor more than 10 years with credit for 153 days spent incarcerated while awaiting trial and sentence.

(HEARING CONCLUDED)

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10 C E R T I F I C A T E

11 I, Donald W. Mitchell, Notary Public and
12 Official Court Reporter, hereby certify that the
13 foregoing pages, numbered 1 - 4, inclusive are a
14 verbatim transcription of my verbatim stenographic
15 notes of the Sentencing held before me as Notary
16 Public on the 16th day of April, 1973 and transcribed
17 under my direction for use in the matter of State
18 of Vermont vs. Bernard F. Matthews, Docket No. 1935-72-
19 Rcr.

20 
21 Notary Public and Official Court Reporter
22
23
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
BERNARD MATTHEWS

Petitioner - Appellant

-against-

JULIUS MOEYKENS

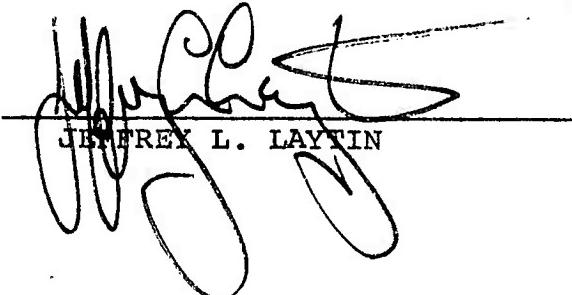
Respondent - Appellee

:
: No. 74-1032

:
: AFFIDAVIT OF SERVICE
: BY MAIL

-----X
STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JEFFREY L. LAYTIN, being duly sworn, deposes and says that I am an attorney associated with Eric Kronfeld, Esq., who is counsel for the Petitioner-Appellant on the above captioned appeal. On the fifteenth day of April 1974 I served the Brief and Appendix for Petitioner-Appellant in the above captioned appeal upon the Attorney General for the State of Vermont by depositing two (2) true copies of same enclosed in a postage paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.


JEFFREY L. LAYTIN

Sworn to before me this

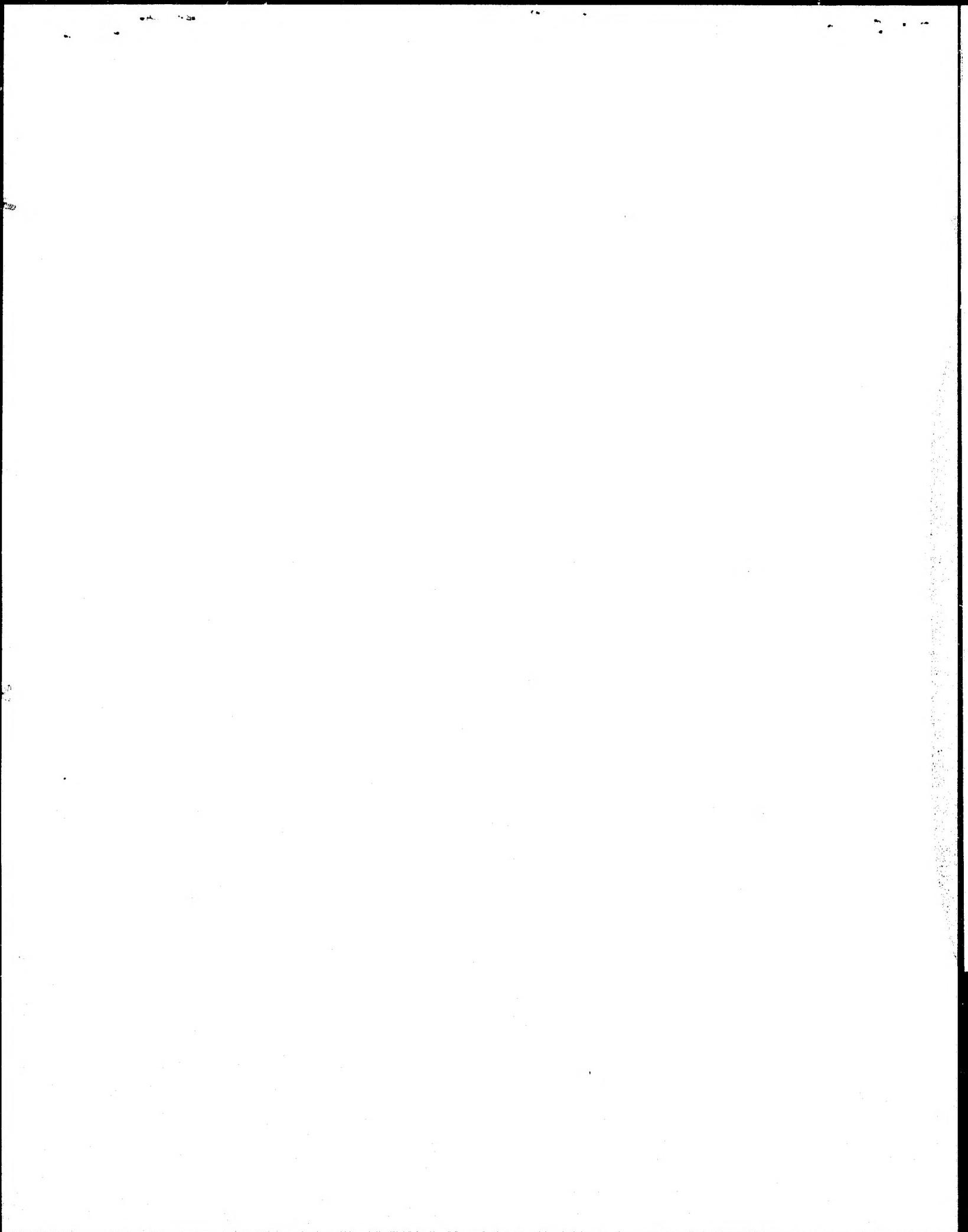
15th day of April, 1974

Bernard J. Matthews

Notary Public

Notary Public, State of New York
No. 31-790385

Qualified in New York County
Commission Expires March 30, 1976



STATE OF NEW YORK, COUNTY OF

ATTORNEY'S CERTIFICATION

I, an attorney admitted to practice in the State of New York, do hereby certify pursuant to Sec. 2105, CPLR, that I have compared the within with the original and have found it to be a true and complete copy thereof.

Dated: 19 Signature.....
Typed or Printed Name.....

STATE OF NEW YORK, COUNTY OF

AFFIRMATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the State of New York, affirms: That the undersigned is the attorney(s) of record for in the within action; that the undersigned has read the foregoing and knows the contents thereof; that the same are true to affirmant's own knowledge, except as to the matters therein stated to be alleged on information and belief; and as to those matters affirmant believes them to be true.

The undersigned further states that the reason this affirmation is made by the undersigned and not by

The grounds of affirmant's belief as to all matters not stated to be upon affirmant's knowledge, are as follows:

The undersigned affirms that the foregoing statements are true, under the penalty of perjury.

Dated: 19 Signature.....
Typed or Printed Name.....

STATE OF NEW YORK, COUNTY OF

ss.:

INDIVIDUAL VERIFICATION

deponent is the
read the foregoing
and knows the contents thereof; that
the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

Sworn to before me, this day of 19

STATE OF NEW YORK, COUNTY OF

ss.:

CORPORATE VERIFICATION

of
named in the within action; that defendant has
and knows the contents thereof; and that the same are true to defendant's own knowledge, except as to the matters therein
stated to be alleged upon information and belief, and as to those matters defendant believes them to be true.
This verification is made by defendant because
is a corporation. Defendant is an officer thereof, to-wit, its
The grounds of defendant's belief as to all matters not stated upon defendant's knowledge are as follows:

Sworn to before me, this _____ day of _____ 19_____

STATE OF NEW YORK, COUNTY OF

ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that defendant is
not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____ 19_____ defendant served the within
upon _____ in this action, at _____

the attorney(s) for

for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depositor under the exclusive care and custody of the United States Post Office within the State of New York.

Sworn to before me, this _____ day of _____ 19_____

STATE OF NEW YORK, COUNTY OF

ss.:

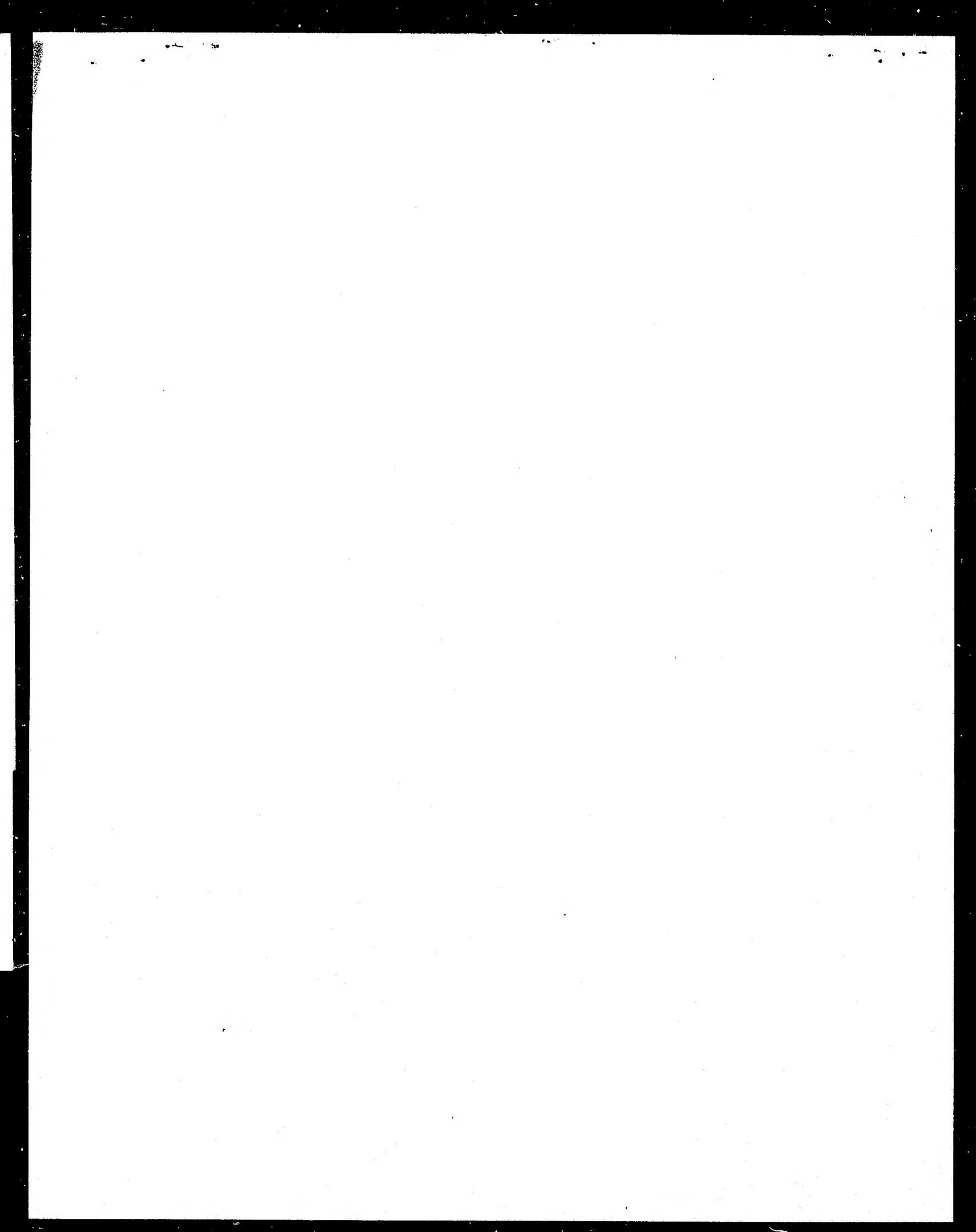
AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that defendant is
not a party to the action, is over 18 years of age and resides at

That on the _____ day of _____ 19_____ at No. _____
defendant served the within

upon _____ by delivering a true copy thereof to _____ personally. Defendant knew the person so served to be the person mentioned and described in said papers as the _____ therein.

Sworn to before me, this _____ day of _____ 19_____



LS

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